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No. 00-969

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

LAWRENCE S. ROBBINS
(Counsel of Record)
LEE H. RUBIN
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner Theresa Squillacote

RICHARD A. SAUBER
(Counsel of Record)
DOUGLAS W. BARUCH
DAVID B. WISEMAN
Fried, Frank, Harris, Shriver & Jacobson
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 639-7000

Counsel for Petitioner Kurt Stand

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REPLY BRIEF FOR PETITIONERS

In opposing petitioners' request for review of the question whether the government is permitted to make derivative use of information protected by a non-constitutional, common law privilege, the government implicitly concedes that a conflict exists, but insists that it is not a sufficiently "square" one to warrant this Court's review. The government's effort to blur the conflict is unavailing. This important question of federal law has deeply divided the circuits and is plainly ripe for determination by this Court. In addition, the government's half-hearted defense of the court of appeals' construction of the espionage laws underscores the need for this Court to make clear that information *may* not "relat[e] to the national defense" if that same information has been made public by non-governmental sources, and that the question of whether such publicly available information is the "same" as disseminated classified information is a question for the jury, not the court. Finally, the government's mantra that several federal judges already have reviewed the sufficiency of the FISA applications *ex parte* does not relieve this Court of its obligation to conduct its own review, where petitioners have been denied any meaningful opportunity to challenge the FISA authorizations and the voluminous record in this case is bereft of any evidence that petitioners were agents of an existing foreign power at the time of the initial FISA authorization.

1. a. The court of appeals, sustaining the trial court, held that petitioner Squillacote was not entitled to an evidentiary hearing at which the government would have to shoulder the "heavy burden" of establishing that its evidence had not been derived from the privileged psychotherapist-patient communications it concededly intercepted in this case. In the court's view, "suppression of any evidence derived from the privileged conversations" would be improper because "the privilege is a testimonial or evidentiary one, and not

constitutionally based." Pet. App. 26a. As we explained in the petition (Pet. 10-12), the circuits are deeply divided on the question whether the government is free to make derivative use of information it obtains in violation of such non-constitutional testimonial privileges.

The government challenges that contention (Opp. 13-16), but its efforts to distinguish case law from the Second, Third, and Seventh Circuits are largely makeweight. With respect to the Second and Seventh Circuit cases involving the attorney-client privilege, the government merely observes that the attorney-client privilege, in contrast to the psychotherapist-patient privilege, "serv[es] constitutional values" (Opp. 15) (citing *United States* v. *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). But that is beside the point. Whatever penumbra-like "constitutional values" the government now finds in the attorney-client privilege, the fact is that this privilege, like the psychotherapist-patient privilege, is merely an "evidentiary" protection; it is not constitutionally ordained. See 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). Indeed, the Second Circuit in *Schwimmer* made that very point in a passage immediately preceding the one quoted by the government in its opposition. See 892 F.2d at 243 ("[T]he rule affording confidentiality to communications between attorney and client endures as the oldest rule of privilege known to the common law."). There is no suggestion that the Second Circuit ruled as it did in *Schwimmer* because it regarded the attorney-client privilege as "constitutionally based." And the Seventh Circuit in *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992), expressly recognized the attorney-client privilege as "a testimonial privilege without constitutional footing." *Id.* at 336. Nevertheless, the court stated that "[t]he proper remedy" for a violation of this merely "testimonial" privilege "would be exclusion of derivative evidence at trial." *Id.*

The government contends (Opp. 14), however, that the Second and Seventh Circuit decisions may be overlooked because none of those cases "squarely held that all evidence

derived from a violation of the attorney-client privilege must be suppressed." Perhaps it depends on what the meaning of "squarely" is. In *Schwimmer*, the Second Circuit ordered an extensive hearing on whether the government had obtained derivative evidence from its breach of the attorney-client privilege; the court of appeals ultimately sustained the defendant's conviction, but only because the government managed to carry its burden to "demonstrate that the evidence it use[d] to prosecute [the defendant] was derived from legitimate, independent sources." *United States* v. *Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991). That, of course, is the very remedy that petitioners sought in this case but were denied because there was no "constitutionally based" right at stake. As for the Seventh Circuit's decision in *White*, it is certainly true, as the government observes (Opp. 15), that "the court of appeals determined that the government had *not* introduced evidence at trial that 'stem[med] directly or indirectly' from evidence obtained in violation of the attorney-client privilege." But why did the Seventh Circuit address such "direct and indirect" use in the first place? It did so because, in its view, "[t]he proper remedy" for the breach even of "a testimonial privilege without constitutional footing" is "exclusion of derivative evidence at trial." 970 F.2d at 336. The Fourth Circuit flatly rejected that very proposition.

As we noted in our petition (Pet. 11-12 (citing cases)), the Fourth Circuit's constitutional/non-constitutional distinction is also in conflict with decisions from the Second and Third Circuits regarding the privilege against adverse spousal testimony. The government does not pretend that this privilege likewise "serv[es] constitutional values" (Opp. 15). Instead, it contends that in the present case, unlike in the spousal privilege line of cases, "neither petitioners nor the therapists were compelled to testify about privileged conversations." Opp. 15. That is truly a distinction in search of a rationale. In the cases involving adverse spousal testimony, the courts have generally held that granting "use-fruits" immunity is "co-extensive" with

the protections of the privilege, and thus required to extinguish the underlying right. See, *e.g.*, *In re Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985) ("'use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse spousal testimony"); *In re Grand Jury Matter*, 673 F.2d 688, 692-94 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege). Thus, it was not, as the government suggests, the act of compulsion, but rather the scope of the spousal privilege that was dispositive in determining that derivative use may not be made of information obtained in breach of that privilege. Indeed, the Second and Third Circuits just as easily could have concluded that the spousal privilege could be overcome with a promise only to avoid *direct* use of the compelled testimony. Instead, those circuits require such a broad immunity precisely because they believe, unlike the Fourth Circuit, that the violation of merely "testimonial" privileges should be remedied by suppressing derivative evidence.[1]

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[1] The government insists that "there is no reason to conclude" that the Fourth Circuit would not suppress evidence obtained in violation of a non-constitutional privilege "in a case in which the government seeks to compel testimony from a witness invoking such a privilege." Opp. 16. In fact, there is good reason to suspect otherwise. Although the Fourth Circuit suggested that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege" (Pet. App. 25a), in the very next breath it added that suppression of the evidence in this case would in any event be improper "given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a. And in the paragraph concluding this section of its opinion, the court of appeals identified the non-constitutional nature of the underlying privilege as a free-standing reason to sustain the trial court's refusal to suppress evidence derived from the

b. Having failed to distinguish the conflicting authority, the government next contends that the question presented "has a somewhat hypothetical quality" because "[t]here is no reason to conclude that the government has * * * 'use[d] the information contained in [privileged communications] to build a criminal prosecution.'" Opp. 17. But that is both untrue and irrelevant.

First, there is a substantial basis for believing that the FBI's Behavioral Program Team did, indeed, capitalize on its interception of the privileged communications. For one thing, the transcribed conversations, far from being "relatively brief and undetailed" (as the government now suggests (Opp. 17)), were in fact richly revealing of Squillacote's array of psychiatric disabilities — including her current mental condition (the very object of the behavioral profile), her family's medical history, her use of medication, and her suicidal ideations. See JA2173-80. The same FBI employee who intercepted and transcribed these communications (Thomas Chmelovski) was then assigned the job of providing critical information regarding Squillacote's personality characteristics to the BAP team, which crafted the psychological profile based in part on his input. In particular, Chmelovski completed a personality assessment test that was used by a Ph.D. psychologist to identify the psychiatric "vulnerabilities" that could be exploited by the FBI in the sting operation. See JA262-263; JA1173-1174. And Katherine Alleman, the case agent who developed the sting, had also been exposed to the privileged conversations. JA354. What is more, much of the most sensitive information contained in the privileged psychotherapist conversations (*e.g.*, Squillacote's mother's tendency toward depression, Squillacote's medication, and her suicidal ideations) also found their way into the BAP profile

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interception of Squillacote's conversations with her psychotherapists. See Pet. App. 27a.

after first appearing in Chmelovski's transcription of the privileged communications.

And all of that, it need hardly be added, is the record we developed *without* the hearing that would have been granted in the Second, Third, and Seventh Circuits. The government insists that, were we to prevail on the question presented, "there is little, if any, prospect that petitioners would ultimately be entitled to any relief" (Opp. 18); but surely it is a bit too early for the government to declare victory and leave the field. If, as petitioners contend, a defendant whose psychotherapist-patient privilege has been breached is entitled to an evidentiary hearing, the government will be required at that hearing to bear "'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.'" *United States* v. *Harris*, 973 F.2d 333, 336 (4th Cir. 1992) (quoting *Kastigar* v. *United States*, 406 U.S. 441, 461-62 (1972)). Perhaps the government will ultimately bear that "heavy burden" — although to do so it will not suffice simply to submit a pair of self-serving affidavits by "[t]he two government agents who contemporaneously learned the contents of the conversations" (Opp. 17). See *Harris*, 973 F.2d at 337 ("the government's mere representations" that it did not use privileged material "are generally insufficient to carry its burden"); *United States* v. *Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985) (same). But petitioners are at least entitled to hold the government to its burden.[2] Because the court of appeals believed — in accord with the Ninth and Tenth Circuits, but in conflict with the Second, Third, and Seventh Circuits — that the breach of a non-constitutional privilege does not prevent the government from making derivative use of any information it obtains, it declined even to grant petitioners a hearing. That decision is wrong and warrants further review.

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[2] The government's derivative use of these communications prejudiced Stand as well given petitioners' uniform defense at trial.

2. The government asserts that petitioners' proposed "national defense" instruction would have required the prosecution "'to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information.'" Opp. 25 (quoting Pet. App. 64a). Petitioners' proposed instruction, however, imposed no such burden. On the contrary, the proposed instruction — taken directly from 1 Sand, Siefert, Loughlin & Reis, MODERN FEDERAL CRIMINAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.01 (1997) — would have called upon the jury simply to consider whether, based upon all of the evidence, the disclosed information was "available to the public at the time of the claimed violation." See Pet. App. 57a (quoting JA1645). Such an instruction would have permitted the government to argue to the jury that information appearing in trade publications is inherently different from similar or identical information in classified government documents because the latter "carry with them the government's implicit stamp of correctness." Pet. App. 63a. And that instruction would have had the advantage — contrary to the jury instruction given in this case — of being faithful to this Court's holding in *Gorin* v. *United States*, 312 U.S. 19 (1941), that the espionage statutes do not prohibit the dissemination of information "[w]here there is no occasion for secrecy." *Id.* at 28. At the government's urging, however, the court of appeals disavowed *Gorin*'s fundamental teaching and held, as a matter of law, that the public availability of information — at least where the information has been made public by sources other than the government — is irrelevant to whether the information "relat[es] to the national defense" within the meaning of the espionage laws. Pet. App. 63a.

Notably, by holding that information contained in "an official document closely held by the government" is never equivalent to the same information in public sources (*id.*), the Fourth Circuit effectively converted the espionage statutes into a flat prohibition on disseminating *classified* documents to a

foreign power. Absent evidence that the government has voluntarily released a piece of classified information at some other time prior to disclosure, the practical effect of the court of appeals' holding is that, as a matter of law, any classified document "relates to the national defense." But that plainly contravenes the plain language of the statute, which speaks of "information relating to the national defense," not "classified information." Compare 18 U.S.C. § 794(a), with 18 U.S.C. § 798(a) (unlawful to "transmit[]" certain types of "classified information").

What is more, the Fourth Circuit's gloss on the "national defense" element of the espionage statutes ignores the internal regulations governing the Department of Defense, which require the government to evaluate whether information should remain classified after such information "[a]ppear[s] in the public domain." 32 C.F.R. § 159a.15(j). As the government's own expert, Admiral Dennis C. Blair, conceded at trial, the declassification review for open publication is triggered whether or not the government was the source of the public disclosure of information. Tr. at 714-15. Moreover, as that same expert acknowledged, information that should be declassified on account of widespread public availability can, and often does, remain classified as a result of bureaucratic inaction. Tr. at 729-30. Thus, while it is undisputed that information may be improperly classified at any given time on the basis of "open publication" by sources other than the government, under the Fourth Circuit's reading of the law a jury may not even consider such "open publication" in determining whether the espionage statutes cover such information.[3] Such

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[3] The government argues that the trial court's instruction in this case did permit the jury to take account of publicly available information from non-governmental sources since it required the government to prove that the disclosure was "potentially damaging to the United States or might be useful to an enemy of the United States." (Opp. 25 (quoting JA1435)). Such a claim is disingenuous, at best, since the government took the extraordinary step at trial of submitting a

a reading cannot be squared with *Gorin* or the plain language of the espionage laws.

3. The government's response to petitioners' FISA challenge mirrors the Kafkaesque nature of the statute itself. "Sure, you can challenge probable cause," the government tells us; "you just can't look at the affidavits that purport to establish it." "Sure, there must be sufficient evidence that petitioners were 'agents of a foreign power' at the time the FISA authority was granted — but you have to take our word for that." "And after all," the government concludes, "'eight FISA Court Judges,' backed by the district court and the court of appeals, all agreed that we met our burden — even though not one of them heard an opposing point of view from the defense."

In America, this Court sits to accord both sides of a dispute the opportunity to be heard. Particularly when the stakes are this large, and the risks of error so substantial, this Court should review the FISA applications — which have been tendered to the Court — to ensure that an appropriate legal standard was used (both for determining the need for disclosure and the elements of agency under FISA), and that probable cause was established. Perhaps the requisite probable cause showing was made, though the marvel of it is that nowhere — not in a 100-page search warrant affidavit, in 550 days of surveillance tapes, or in two full weeks of trial — did the government string together even two sentences (much less probable cause) of an agency relationship with Russia (the only plausible contender).[4]

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revised jury instruction on this element (ultimately adopted by the trial court) for the express purpose of foreclosing jury consideration of such evidence. See JA1534. And the trial court plainly understood its instruction as precluding any defense based upon information placed in the public domain by sources other than the government. See JA2398.

[4] Specifically, there is not a stitch of evidence in the thousands of pages of surveillance transcripts and investigative materials that

Further review is essential to the vindication of petitioners' basic constitutional rights.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE S. ROBBINS
(Counsel of Record)
LEE H. RUBIN
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner
Theresa Squillacote

RICHARD A. SAUBER
(Counsel of Record)
DOUGLAS W. BARUCH
DAVID B. WISEMAN
Fried, Frank, Harris,
Shriver & Jacobson
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 639-7000

Counsel for Petitioner
Kurt Stand

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petitioners *knowingly* conspired with or aided and abetted any other person (whether it be alleged co-conspirator James Clark, their alleged East German "handler" Lothar Ziemer, or anyone else) with the specific intent to engage in *clandestine intelligence gathering activities* on behalf of Russia. See JA009 (item # 53 at 7 n.4, 8 n.5) (government relied on "clandestine intelligence gathering" and "conspiracy" and "aiding and abetting" provisions (50 U.S.C. §§ 1801(b)(2)(A) and (E)) in obtaining authorization under FISA). Indeed, the record (including classified material) is so utterly devoid of evidence suggesting any agency relationship between petitioners and Russia at the time of the original FISA authorization that if this case does not warrant disclosure of the underlying affidavits (see 50 U.S.C. §§ 1806(f), 1825(g)), no case ever will.